No. 82-1390

In The

Supreme Court of the United States

October Term, 1982

Ronald N. Ashley and R. D. Thaggard, et al,
Petitioners

—v.—

The City of Jackson, Mississippi, et al, and
The United States of America,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

RONALD N. ASHLEY
Attorney at Law
147 Hazel Crest Drive
Jackson, Mississippi 39212
(601) 373-5071

DIXON L. PYLES
Pyles and Tucker
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

Attorneys for Petitioners

Questions Presented

1. Whether consent decrees between a municipality, the United States, and minority individuals, entered without findings of identified discrimination, may legally or constitutionally vitiate the individual right of action and bar persons not party to, and who were denied intervention in the consent decree litigation from instituting independent reverse discrimination suits against the municipality (A) challenging racial preferences *not required* by the decrees, (B) challenging preferences accorded to nondiscriminatees, or to discriminatees beyond the extent necessary to make them "whole", and (C) challenging the decrees as unlawful, unconstitutional, and void.

2. Whether, consistent with Due Process, the individual *right* to sue under, *inter alia*, the Fourteenth Amendment and Title VII may be judicially limited solely to the mere *possibility* of intervention in prior government consent decree litigation, especially where such intervention has been denied.

3. Whether Title VII's "parallel and overlapping remedies" confer upon District Court jurisdiction of individual reverse discrimination and retaliation suits where the resultant judgment on the merits might be inconsistent with prior consent decrees entered in settlement of a government "pattern or practice" suit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The Briefs in opposition filed by the United States and the City of Jackson, Mississippi, collectively assert **(1)** that the lower court's dismissal of petitioners' independent reverse-discrimination suits for lack of subject-matter jurisdication as being impermissible collateral attacks upon prior consent decrees is supported by applicable precedent; **(2)** that the "merits" of petitioners actions are "case-specific" and are not properly before the court; and **(3)** that petitioners have a "reasonable opportunity to present their claims by intervention in the consent decree litigation.

ARGUMENT

1. The initial thrust of Petitioners' actions, and their petition herein, is premised upon the contention that the challenged employment practices are not required by the subject consent decrees, and, logically, that their actions do not "attack" the

decrees.[1] The US asserts that "[b]ecause it is jurisdictional in nature, the rule (against collateral attacks) obviously controls *regardless of the validity of the contentions sought to be litigated,*" and that "the merits of Petitioners' contentions. . .are not properly before the Court" (US Brief, p.4, n.3). Not only is the governments' position illogical and bad law, it is also contrary to prior decisions of this Court and various Courts of Appeal.

In *Land v. Dollar,* 330 US 731, 735 (1947), this Court recognized that there were types of cases "where the question of jurisdiction is dependent on decision of the merits." The Fifth Circuit has held that "where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other." *McBeath v. Inter-American Citizens for Decency Com.*, 347 F.2d 359, 363 (5th Cir. 1967). See also, *Schramm v. Oakes,* 352 F.2d 143 (10th Cir. 1965); *Firemans Fund Ins. Co. v. Railway Express Agency,* 253 F.2d 780 (6th Cir. 1958).

Similarly, it is impossible to fairly decide whether petitioners are "attacking" the consent decrees without first determining whether the decrees actually require the challenged racial preferences. Accordingly, Petitioners are entitled to a resolution of the merits of the issue as a necessary and proper prerequisite to a factual determination of the jurisdictional question raised by respondents.

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[1]It is the resolution of the "merits" of this issue that the respondents obviously wish to avoid. Although Petitioners also briefly discussed the "merits" of their alternative allegations that the decrees are void, they do not seek this Court's resolution of the issue, but only a reaffirmation of its' prior decisions establishing the right to litigate the issue in a collateral proceeding. The brief discussion of the merits of this latter issue was undertaken to demonstrate that said allegations are not frivilous, and that the United States has itself challenged a similar consent decree on virtually identical grounds before the Fifth Circuit *en banc* in *Williams v. City of New Orleans, Louisiana,* 5th Cir. No. 82-3435.

2.A. The United States contends that resolution of the intermingled merits/jurisdictional issue as aforesaid is not worthy of review in that it calls for a "case-specific" review of "the District Court's *specific conclusion*, affirmed by the Court of Appeals, that Petitioners' suits are *in fact* collateral attacks on the. . .consent decrees" (US Brief, p.4, par.2). (emphasis added) Conversely, and almost in the same breath, the United States asserts that "the District Court. . .***did not consider*** or discuss the merits of Petitioners' contentions as to the. . .decrees; nor did the Court of Appeals" (US Brief, p.4, n.3). Pure double-talk. It is obviously impossible to arrive at a "specific conclusion" that Petitioners' actions are "in fact" collateral attacks without first ***considering*** the facts. . .which the Fifth Circuit admittedly refused to do.

Accordingly, a case-specific resolution of the facts relevant to the jurisdictional question herein is absolutely necessary. The larger jurisdictional issue, however, is whether, prior to dismissal of an independent action under the "collateral attack" rule, the Court must determine **(1)** that the plaintiffs are bound to the prior decree, **(2)** that the challenged practices are actually required by the decrees, and/or **(3)** that such practices, if required, are nevertheless subject to collateral attack as being illegal, inequitable, contrary to public policy, and/or unconstitutional.

B. Furthermore, a definitive resolution by this Court of the issues herein could have a significant impact far beyond this specific case.

Included within the first question presented for review is the subsidiary question, whether it is necessary or proper for a local government employer to accord racial preferences in order to achieve affirmative action "goals" agreed to in a consent decree with the United States. Petitioners submit that a negative answer is a foregone conclusion in view of the Government's policy statement on that specific issue(Pet. App. H). Because said policy would apply in all similar and

pending consent decree litigation,[2] the Court's answer would likewise apply and would provide valuable and far-reaching guidelines.

Also included therein are the questions **(1)**whether racial preferences may be accorded to non-victims of racial discrimination, or to victims beyond the extent necessary to make them "whole"; and if not, **(2)**whether "innocent" third parties adversely affected thereby have a right to institute independent lawsuits challenging same and to seek compensatory and/or injunctive relief. One hardly needs to elaborate on the impact of an answer to these questions.

3. The cases cited by Respondents in support of the Lower Court's decision are distinguishable from Petitioners' actions in several respects.

First, the courts determined that the practices or actions challenged by the plaintiffs in the cited cases were specifically *required* by the various consent decrees.[3] In Petitioners' case

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[2]A Department of Justice report obtained subsequent to the filing of the Petition herein revealed that there were in effect approximately 65 consent decrees between the United States and approximately 141 state and local government employers and agencies, which decrees contain hiring, promotion, and/or recruitment "goals". The genesis of Petitioners' actions was the City's unnecessary use of racial preferences, in violation of the law, in attempting to meet its "goals" under the consent decrees. The number of employees and applicants for employment and/or promotion in the other 141 states, cities, etc., who have been, are being, and will continue to be similarly adversely affected by such governmental misconduct can only be imagined, but the number is no doubt considerable.

[3]*O'Burn v. Sharp*, 70 F.R.D. 549, 551, (E.D. PA. 1975). Plaintiffs sought "a permanent injunction against the use of the hiring and promotion procedures *mandated by*" the decrees, and "a permanent injunction against the implementation of the...consent decree." (emphasis added); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D. NY 1977) "[T]he practices which the plaintiffs challenge were properly *established by*...the...consent decree." (emphasis added); *Black and White Children of Pontiac v. City of Pontiac School District*, 464 F.2d 1030 (6th

the Fifth Circuit refused to even consider the question.

The second distinguishable aspect of said cases is that there apparently was no issue regarding a denial of due process caused by binding the plaintiffs therein to a consent decree to which they were not a party. The issue either was not raised, the plaintiffs had notice of and an opportunity to intervene and object to the entry of the decrees prior to their entry[4] but failed to do so, or the plaintiffs actually participated in the formulation and approval of the decrees,[5] or, unlike the situation herein,[6] intervention was still an available procedure.[7]

Cir 1972) "Plaintiffs...sought an injunction restraining the (defendant) from transporting children *pursuant to* an order of the United States District Court..." (emphasis added); *Dennison v. City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981) action sought "to compensate non-minority employees denied promotions as a result of an affirmative action program established *pursuant to* a consent decree..." (emphasis added).

The Court's incidental discussion of collateral attack in *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) is *mere dicta*, the sole issue therein being whether the District Court abused its discretion in denying intervention.

[4]*Prate v. Freedman, supra*, at 1374: "[T]he plaintiffs (previously) had notice of the terms of the consent decree but failed to act..."; *Dennison v. City of L.A., supra*, at 695: Prior to approval of the decree "the District Court conducted a Fairness Hearing to allow persons who had previously submitted written objections to the consent decree the opportunity to present orally their objections to the Court. Written notice of the hearing was sent to all employees. "The (Apellant) appeared at the hearing and...criticized the adverse impact of the consent decree on non-minority employees."; *Culbreath v. Dukakis, supra*, at 21: "[T]he District Court issued a published decision in which it specifically invited intervention from proper parties."

[5]See *O'Burn v. Sharp*, 393 F.Supp. 561 (ED PA 1975)

[6]The District Court summarily denied Ashley intervention in the *USA* case, and denied the *Thaggard* plaintiffs intervention in the *Corley* case.

[7]*Black and White Children of Pontiac, supra*, at 1031: Impliedly, "the door of the District Court is clearly open (as it has been!) to *the parties* to present any unanticipated problems...(emphasis added).

Finally, none of the cases cited involved a consent decree entered in a government "pattern and practice" suit in the Fifth Circuit, and thus the plaintiffs were not confronted with the all-but-absolute bar to intervention established in *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975).[8]

4. Respondents contend that Petitioners have a "reasonable opportunity" to present their claims by intervention in the consent decree litigation (US Brief, p.5, par.3; City Brief, p.3). This is a particularly audacious statement in view of the fact that such intervention was ***denied... without explanation!***

The point here, that should be of utmost concern to this Court, is that a "reasonable opportunity" to present a claim does not equate with the *right* to sue under the Constitution and Laws of the United States.[9]

True, the District Court could have considered Petitioners' claims by intervention. It had the opportunity and could have consolidated their actions with the consent decree actions.[10] It could have taken ancillary jurisdication of their actions.[11] But

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[8]The *Allegheny* decision held that *no* private party has a *right* to intervene in a government "pattern or practice" suit, and that there is a "...strong judicial policy against nonexpress private intervention in governmental enforcement litigation *when an adequate private remedy is freely accessible.* (cites ommited) This policy likewise applies to applications for intervention by right under Rule 24(a) (2), and applications for permissive intervention under Rule 24(b)." 517 F.2d at 844 (emphasis added).

[9]The rule urged by Respondents could easily be abused and is lacking in specificity. Substitution of specific statutes of limitation with subjective determinations of whether a motion to intervene is "timely" would provide little guidance to would-be plaintiffs.

[10]See, e.g., *Brewer v. Republic Steel Corp.*, 8 F.E.P. cases 517 (N.D. Ohio 1974).

[11]When an independent equtable action to enjoin or otherwise give relief

having failed to allow intervention, the Court should not also be allowed to deny Petitioners their right to institute an independent action, their only realistic[12] alternative.[13]

5. Finally, Petitioners will briefly respond to the various reasons offered by the United States in support of the decision below. First, a decision, permitting independent lawsuits challenging consent decrees (or the misapplication thereof) will not in and of itself "proliferate" lawsuits.[14] It is the inclu-

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from a federal judgement is brought in the same federal court which rendered the judgment under attack, the action is ancillary for purposes of federal jurisdication and new jurisdictional grounds are not needed. *Pacific Railroad of Missouri v. Missouri Pacific Railway*, III US 505, at

[12]"Post judgement intervention is rare." *U.S. v. Allegheny-Ludlum Inds., Inc.*, 553 F.2d 451 (5th Cir. 1977)

[13]In *O'Burn v. Sharp, supra*, at 552, the court noted that if "the plaintiffs *had no alternative* but to institute an independant lawsuit in order to challenge the . . .consent decree," they might be entitled to do so.

Distinguishing *Harmon v. San Diego County*, 477 F.Supp. 1084 (S.D. Cal. 1979), a case very similar to Petitioners' actions, the Court in *Dennison, supra*, noted that the consent decree the County asserted was being collaterally attacked did not require the challenged practices, and that "Harmon had twice attempted to intervene in the consent decree action, but his efforts were strenuously and successfully opposed by the County." 658 F.2d 694 at 697, N.2.

[14]On the contrary, it is the rule sought by Respondents that would "proliferate" needless actions. Post-judgment intervention being rare, the rule would, for example, compel non-minorities to immediately seek to intervene whenever a minority filed suit seeking class-wide "affirmative" relief, just in case the relief, if granted, might somehow affect their interests. A ridiculous situation at best, with obvious problems facing the would-be intervenors at the pre-decree stage, such as establishing interest impairment, standing, etc . . .

The burden should be on the parties to consent decrees to limit preferential remedies to the extent necessary to restore actual, indentifiable victims of proven discrimination to their "rightful place" or to make them "whole". If the agreed relief is so limited, there would be no cause for ob-

sion by the parties of impermissible provisions, or the misapplication of abuse of consent decrees by the parties, for example, that gives rise to lawsuits. And *if*, as the Justice Department contends, intervention is such a reasonable and viable alternative to an independent lawsuit, the issues raised by non-parties to the decree would ultimately be decided by the Court in *either* event, but the total number of *claims* would be the same. On the other hand, a decision allowing such independent actions would eliminate the unnecessary barriers to the courthouse that are associated with intervention, and would reaffirm "that. . .persons forced to settle their claim of right and duty through the judicial process (will) be given a meaningful opportunity to be heard." *Boddie v. Conn.*, 401 US 371, 377 (1971).

Insofar as the "danger of inconsistent or contradictory adjudications" is concerned, the Fifth Circuit has specifically recognized that non-partys to consent decrees may obtain "double, multiple, or otherwise inconsistent" relief in an independent action. *U.S. v. Allegheny Ludlim Ind., supra*, at 877. If Petitioners establish their right to such relief *on the merits*, it should not be denied merely because other parties in another suit had agreed to "inconsistent or contradictory" provisions. Because Petitioners are not party to the consent decrees, "(d)ue process prohibits estopping them despite one or more existing adjudications of the indentical issue which stand squarely against their position." *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 US 313, 329 (1971). And because the District Court that approved the decrees lacked jurisdication over the Petitioners, the decrees do not bar Petitioners from obstaining collateral relief. *Schlesinger v. Councilman*, 420 US 738 (1975).

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jection. But if the agreed relief exceeded statutory or constitutionally permissible limits, persons adversely affected thereby should be entitled to institute an independent action challenging same, as in the case of any other unlawful discriminatory act.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectively submitted,

Ronald N. Ashley
Attorney At Law
147 Hazel Crest Drive
Jackson, Mississippi 39212
(601) 373-5071

Dixon L. Pyles
Pyles and Tucker
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668